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Sex Discrimination and the United States Supreme Court: Recent Developments in the Law

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Summary

With its recent sex discrimination decisions, the United States Supreme Court has not only further defined the applicability of the equal protection guarantees of the Constitution and the nondiscriminatory policies of federal statutes, but has rejected the use of gender stereotypes and continued to recognize the discriminatory effect of gender hostility in the workplace and in schools. This report focuses on recent sex discrimination challenges based on the equal protection guarantees of the Fourteenth and Fifth Amendments, Title VII of the Civil Rights Act of 1964 (employment discrimination), and Title IX of the Education Amendments of 1972 (discrimination in schools). The Court's decisions in cases involving Title VII and Title IX are particularly noteworthy because they illustrate the Court's recognition of sexual harassment in both the workplace and the classroom.

Although the Court's analysis of sex discrimination challenges under the Constitution differs from its analysis of sex discrimination under the two federal statutes discussed in this report, it is apparent that the Court is willing to refine its standards of review under both schemes to accommodate the novel claims presented by these cases.

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Sex Discrimination and the United States Supreme Court: Recent Developments in the Law

With its recent sex discrimination decisions, the United States Supreme Court has not only further defined the applicability of the equal protection guarantees of the Constitution and the nondiscriminatory policies of federal statutes, but has rejected the use of gender stereotypes and continued to recognize the discriminatory effect of gender hostility in the workplace and in schools. This report focuses on recent sex discrimination challenges based on the equal protection guarantees of the Fourteenth and Fifth Amendments, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Although the Court's analysis of sex discrimination challenges under the Constitution differs from its analysis of sex discrimination under the two federal statutes discussed in this report, it is apparent that the Court is willing to refine its standards of review under both schemes to accommodate the novel claims presented by these cases.

Equal Protection Cases

Constitutional challenges that allege discrimination on the basis of sex are premised either on the equal protection guarantees of the Fourteenth Amendment or the equal protection component of the Fifth Amendment. To maintain an equal protection challenge, government action must be established; that is, it must be shown that the government, and not a private actor, has acted in a discriminatory manner. While the Fourteenth Amendment prohibits discriminatory conduct by the states, the Fifth Amendment forbids such action by the federal government.

The Fourteenth Amendment provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.

U.S. CONST. amend. XIV (*emphasis added*).

Although the Fourteenth Amendment requires equal protection, it does not preclude the classification of individuals. The Court has noted that the Constitution does not require things which are "different in fact or opinion to be treated in law as

though they were the same."[1] A classification will not offend the Constitution unless it is characterized by invidious discrimination.[2] The Court has adopted three levels of review to establish the presence of invidious discrimination:

> **Strict scrutiny**: This most active form of judicial review has been applied where there is either a suspect classification (*e.g.* race, national origin, alienage) or a burdening of a fundamental interest (*e.g.* privacy, marriage). A classification will survive strict scrutiny if the government can show that it is *necessary* to achieving a *compelling* interest.[3] Most statutory classifications subject to strict scrutiny are invalidated.
>
> **Intermediate scrutiny**: This level of review is not as rigorous as strict scrutiny. A classification will survive intermediate scrutiny if it is *substantially related* to achieving an *important* government objective.[4] Sex classifications are subject to intermediate scrutiny.
>
> **Rational basis review**: This least active form of judicial review allows a classification to survive an equal protection challenge if the classification is *rationally related* to a *legitimate* government interest.[5] This level of review is characterized by its deference to legislative judgment. Most economic regulations are subject to rational basis review.

The Court's adoption of intermediate scrutiny for sex classifications did not occur until 1976. In *Craig v. Boren*, the Court declared unconstitutional an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18.[6] Females above the age of 18, but below 21, were allowed to purchase this beer. Although the Court agreed with the state's argument that the protection of public health and safety is an important government interest, it found that the gender classification employed by the statute was not substantially related to achieving that goal. The statistical evidence presented by the state to show that more 18 to 20-year-old males were arrested for drunk driving and that males between the ages of 17 and 21 were overrepresented among those injured in traffic accidents could not establish that the statute's gender classification was substantially related to ensuring public health and safety.[7] In addition to their methodological problems, the statistics failed to establish

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[1]*Tigner v. Texas*, 310 U.S. 141, 147 (1940).

[2]See *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

[3]See *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973).

[4]See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

[5]See *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Mass Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Maher v. Roe*, 432 U.S. 464 (1977).

[6]429 U.S. 190 (1976).

[7]The state also introduced the following: a random roadside survey that indicated that young males were more inclined to drive and drink beer than were their female equivalents; FBI

(continued...)

the dangerousness of nonintoxicating 3.2% beer for purposes of distinguishing between males and females.

In establishing an intermediate level of review for sex classifications, the *Craig* Court identified what has been a common theme in sex discrimination cases under the Fourteenth Amendment: stereotypes and generalizations about the sexes.[8] In *Craig*, the Court acknowledged its previous invalidation of statutes that premised their classifications on misconceptions concerning the role of females. The Court's rejection of the use of stereotypes may be seen in many of the cases in this area.[9] The Court's most recent decisions allude similarly to the use of stereotypes and generalizations.

In *J.E.B. v. Alabama*, the Court determined that the state could not use its peremptory challenges to exclude male jurors in a paternity and child support action.[10] In reaching its conclusion, the Court reviewed the historical exclusion of women from juries because of the belief that women were "too fragile and virginal to withstand the polluted courtroom atmosphere."[11] In *J.E.B.*, the Court questioned the state's generalizations of male jurors being more sympathetic to the arguments of a father in a paternity action and female jurors being more receptive to the mother. The Court maintained that state actors who exercise peremptory challenges in reliance on gender stereotypes "ratify and reinforce prejudicial views of the relative abilities of men and women."[12] The Court feared that this discriminatory use of peremptory challenges would not only raise questions about the fairness of the entire proceedings, but also create the impression of the judicial system acquiescing in the denial of participation by one gender.

In *U.S. v. Virginia*, the Court conducted a more searching form of intermediate scrutiny to find unconstitutional the exclusion of women from the Virginia Military Institute (VMI).[13] While articulating the need to show that a classification is

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[7](...continued)
nationwide statistics showing an increase in arrests for drunk driving; and similar statistics from other jurisdictions.

[8]429 U.S. at 198.

[9]See *Califano v. Goldfarb*, 430 U.S. 199 (1977) (Invalidated section of the Social Security Act that permitted survivors' benefits for male widows only if they were receiving half of their support from their wives); *Orr v. Orr*, 440 U.S. 268 (1979) (Invalidated Alabama statute that imposed alimony obligations on husbands, but not wives); *Caban v. Mohammed*, 441 U.S. 380 (1979) (Invalidated New York statute that required the consent of the mother, but not the father, to permit the adoption of an illegitimate child); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (Invalidated policy of a state-supported university that limited admission to its nursing school to women on the grounds that it reinforced traditional stereotypes).

[10]511 U.S. 127 (1994).

[11]511 U.S. at 133.

[12]511 U.S. at 141.

[13]518 U.S. 515 (1996).

substantially related to an important government interest, the Court also required the state to establish an "exceedingly persuasive justification" for its actions.[14]

Virginia advanced two arguments in support of VMI's exclusion of women: first, the single-sex education offered by VMI contributed to a diversity of educational approaches in Virginia; second, VMI employed a unique adversative method of training that would be destroyed if women were admitted.[15]

After reviewing the history of Virginia's educational system, the Court concluded that VMI was not established or maintained to promote educational diversity. In fact, VMI's "historic and constant plan" was to offer a unique educational benefit to only men.[16] VMI was not meant to complement other Virginia institutions as a single-sex educational option. Further, the Court recognized Virginia's historic reluctance to allow women to pursue higher education. Any interest Virginia had in maintaining educational diversity seemed to be "proffered in response to litigation."[17]

In addressing Virginia's second argument, the Court expressed concern over the exclusion of women from VMI because of generalizations about their ability. While acknowledging that most women would probably not choose the adversative method, the Court maintained that some women had the will and capacity to succeed at VMI. Following *J.E.B.*, the Court cautioned state actors to not rely on overbroad generalizations to perpetuate patterns of discrimination. While the Court believed that the adversative method did promote important goals, it concluded that the exclusion of women was not substantially related to achieving those goals.

After determining that VMI's exclusion of women violated the Fourteenth Amendment, the Court reviewed the state's remedy, a separate program for women. Virginia established the Virginia Women's Institute for Leadership (VWIL) following the adverse decision of the court of appeals. Unlike VMI, VWIL did not use the adversative method because it was believed to be inappropriate for most women.[18] VWIL lacked the faculty, facilities, and course offerings available at VMI. Because VWIL was not a comparable single-sex institution for women, the Court concluded that it was an inadequate remedy for the state's equal protection violations. VMI subsequently became coeducational.

Finally, the Court addressed gender stereotypes in two cases involving immigration issues. In *Miller v. Albright*, the Court considered a challenge to § 309

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[14]*Id*.

[15]See also Kimberly D. Jones, *United States v. Virginia: The Constitutionality of Public Single-Sex Schools*, CRS Report 96-924 A.

[16]518 U.S. at 540.

[17]518 U.S. at 533.

[18]518 U.S. at 549.

of the Immigration and Nationality Act.[19] The petitioner, the child of an American father and a Filipino mother, contended that § 309 imposed additional requirements for establishing American citizenship when a child is fathered by an American citizen outside of the United States.[20] For children born of a citizen mother and an alien father, citizenship is established at birth. However, for children born of a citizen father and an alien mother, citizenship is not established until the father or the child takes affirmative steps to confirm their relationship by the child's eighteenth birthday. In this case, the petitioner's father did not attempt to establish his relationship with his daughter until after her eighteenth birthday. Thus, the petitioner's application for citizenship was denied.

The case produced five different opinions. While six justices agreed that the petitioner's complaint should be dismissed, they provided different reasons for this conclusion. Justices Stevens and Rehnquist maintained that § 309's distinction between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers is permissible because it is "eminently reasonable and justified by important Government policies."[21] Justices O'Connor and Kennedy contended, however, that the distinction could withstand only rational basis review and should not satisfy the kind of heightened scrutiny Justice Stevens seemed to conduct. Setting aside the issue of § 309's constitutionality, Justices O'Connor and Kennedy believed that the petitioner lacked the standing necessary to even pursue her claim. Finally, Justices Scalia and Thomas contended that the petitioner's complaint should be dismissed because the Court lacks the power to confer citizenship. Having acknowledged that Congress has the exclusive authority to grant citizenship, Justices Scalia and Thomas believed that there was no need to address the constitutionality of § 309. Justices Ginsberg, Breyer, and Souter dissented in opinions written by Justices Ginsberg and Breyer.

In their separate opinions, Justices Stevens, O'Connor, Ginsburg, and Breyer each addressed the petitioner's argument that § 309 invokes gender stereotypes. The petitioner contended that § 309 relies on the belief that an American father "remains aloof from day-to-day child rearing duties," and will not be as close to his child.[22]

Justice Stevens maintained that the statute has a non-stereotypical purpose of ensuring the existence of a blood relationship between father and child. Justice Stevens recognized that the distinction is reasonable because mothers have the opportunity to establish parentage at birth, while fathers do not always have that opportunity. Further, he contended that the distinction encourages the development of a healthy relationship between the citizen father and the foreign-born child, and fosters ties between the child and the United States. Thus, § 309's additional requirements are appropriate for fathers, but unnecessary for mothers.

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[19]523 U.S. 420 (1998).

[20]See 8 U.S.C. § 1409.

[21]523 U.S. at 441.

[22]523 U.S. at 443.

In their dissenting opinions, Justices Ginsburg and Breyer contended that § 309 relies on generalizations about men and women and the ties they maintain with their children. Justice Ginsberg argued that § 309's goals of assuring ties between the citizen father and the foreign-born child, and between the child and the United States can be achieved without reference to gender. Justice Breyer argued similarly, positing a distinction between caretaker and non-caretaker parents, rather than mother and father.

In *Nguyen v. INS*, the Court considered a second challenge to § 309.[23] The facts in *Nguyen* closely resembled those in *Miller*. Nguyen, the child of a citizen father and a non-citizen mother, born out of wedlock, challenged § 309 on the grounds that its differing requirements for acquiring citizenship, based on the sex of the citizen parent, violated the Fifth Amendment's guarantee of equal protection.

A majority of the Court concluded that § 309's differing requirements were justified by two important government objectives. First, the Court found that the government has an important interest in assuring that a biological parent-child relationship exists.[24] While a mother's relationship to a child may be established at birth or from hospital records, a father may not be present at the birth and may not be included on such records. In this way, the Court maintained, fathers and mothers are not similarly situated with regard to establishing biological parenthood.[25] Thus, a "different set of rules . . . is neither surprising nor troublesome from a constitutional perspective."[26]

Second, the Court found that the government has an important government interest in ensuring that the child and the citizen parent have some demonstrated opportunity or potential to develop a relationship "that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[27] The opportunity for a meaningful relationship is presented to the mother at birth. However, the father is not assured of a similar opportunity. The Court concluded that § 309 ensures that an opportunity for a meaningful relationship is presented to the father before citizenship is conferred upon his child.

The Court found that § 309's differing requirements were substantially related to the important government interests. The Court noted that by linking citizenship to the child's youth, Congress promoted an opportunity for a parent-child relationship during the formative years of the child's life.[28] Alluding to its decision in *VMI*, the

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[23]533 U.S. 53 (2001).

[24]533 U.S. at 62.

[25]533 U.S. at 63.

[26]*Id*.

[27]533 U.S. at 65.

[28]533 U.S. at 68-69.

Court maintained that the fit between the § 309 requirements and the important government interests was "exceedingly persuasive."[29]

Like the petitioner in *Miller*, Nguyen argued that § 309 embodied a gender-based stereotype. However, the Court found that § 309 addresses an "undeniable difference in the circumstance of the parents at the time a child is born."[30] This difference is not the result of a stereotype or "a frame of mind resulting from irrational or uncritical analysis."[31] Rather, § 309 recognizes simply that at the moment of birth, the mother's knowledge of the child is established in a way not guaranteed to the unwed father.

While the Court's recent decisions involving sex and equal protection illustrate that it is concerned with the stereotyping of men and women, it is unclear whether it will continue to subject sex classifications and any related stereotypes to a traditional form of intermediate scrutiny. The Court's requirement of an "exceedingly persuasive justification" in *VMI* suggests that it may be interested in conducting a more exacting form of judicial review for sex classifications. In his *Miller* dissent, Justice Breyer emphasized the need to apply the standard established in *VMI*. However, in *Nguyen*, both the majority and the dissenting justices, in discussing an "exceeding persuasive justification," simply reiterated the traditional test that is used when applying intermediate scrutiny.[32] Thus, it is not clear whether sex classifications in future cases will be subject to a traditional form of intermediate scrutiny or some form of heightened scrutiny.

Title VII of the Civil Rights Act of 1964

Title VII prohibits an employer from discriminating against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin.[33] Sex discrimination cases

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[29]533 U.S. at 70.

[30]533 U.S. at 68.

[31]*Id*.

[32]See 533 U.S. at 70 ("We have explained that an 'exceedingly persuasive justification' is established 'by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"). See 533 U.S. at 74 ("Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex based classification embodied in 8 U.S.C. § 1409(a)(4) – *i.e.*, because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives – I would reverse the judgment of the Court of Appeals.").

[33]Title VII provides, in relevant part, that it is an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,

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under Title VII have involved sexual harassment, pregnancy discrimination, and wage disparities among employees.[34]

The Court has developed two principal models for proving claims of employment discrimination.[35] The "disparate treatment" model focuses on an employer's intent to discriminate. Alternately, the "disparate impact" model is concerned with the adverse effects of an employer's practices on a protected class. Disparate impact analysis may find a facially neutral employment practice to be violative of Title VII even without evidence of the employer's subjective intent to discriminate. To succeed, a plaintiff must demonstrate that the application of a specific employment practice has had a disparate impact on a particular group of employees.[36]

Both disparate treatment and disparate impact analysis involve a system of evidentiary burden shifting. Both models require the plaintiff to establish a prima facie case of discrimination. If such a case can be established, the burden shifts to the employer to articulate a defense for its actions. At that point, the employer may produce evidence showing that its actions are justified because of the needs of its business. Alternately, the employer may contend that otherwise discriminatory conduct satisfies a bona fide occupational qualification (BFOQ). Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[37] Ultimately, however, the plaintiff retains the burden of persuasion; that is, the plaintiff must disprove the employer's assertion that the adverse employment action or practice is based on business necessity or is a BFOQ.

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[33](...continued)

color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

[34]See also Karen J. Lewis, *Sex Discrimination and the United States Supreme Court Developments in the Law*, CRS Report 89-500A.

[35]See also Charles V. Dale, *The Civil Rights Act of 1991: A Legal Analysis of Various Proposals to Reform the Federal Equal Employment Opportunity Laws*, CRS Report 91-757A.

[36]See also *Ward's Cove Packing Company v. Atonio*, 490 U.S. 642 (1989).

[37]42 U.S.C. § 2000e-2(e)(1).

Pregnancy Discrimination

In recent years, the Court has addressed Title VII and sex discrimination most frequently in the context of sexual harassment. In *UAW v. Johnson Controls*, however, the Court considered whether an employer may discriminate against fertile women because of its interest in protecting potential fetuses.[38]

Johnson Controls, a battery manufacturer, implemented a policy that excluded "women who are pregnant or who are capable of bearing children" from jobs that exposed them to lead.[39] Lead was the primary ingredient in the manufacturing process at Johnson Controls. Although fertile women were excluded from employment, fertile men were still permitted to work.

The Court found that Johnson Controls' policy was facially discriminatory because it did not apply to the reproductive capacity of the company's male employees in the same way it applied to that of female employees. The Court's conclusion was bolstered by the Pregnancy Discrimination Act of 1978 (PDA), which provides that discrimination "on the basis of sex" for purposes of violating Title VII includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[40]

Although Johnson Controls asserted that sex was a BFOQ for protecting fetal safety, the Court maintained that discrimination on the basis of sex for safety concerns is allowed only in narrow circumstances.[41] The Court stressed that to qualify as a BFOQ, an employment practice must relate to the essence or central mission of the employer's business.[42] Because the potential fetuses of Johnson Controls' females employees were not customers or third parties whose safety was essential to the business of battery manufacturing, the Court rejected Johnson Controls' BFOQ defense.

Sexual Harassment

Courts have recognized two forms of sexual harassment under Title VII. The first, quid pro quo sexual harassment, occurs when submission to unwelcome sexual advances or other conduct of a sexual nature is made a condition of an individual's employment or is otherwise used as the basis for employment decisions. The second

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[38]499 U.S. 187 (1991). See also Gina M. Stevens, *Sex-Based Discrimination: UAW v. Johnson Controls, Inc.*, CRS Report 91-323A.

[39]499 U.S. at 192.

[40]See 42 U.S.C. § 2000e(k).

[41]499 U.S. at 202.

[42]See *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Court found sex to be a BFOQ because the employment of a female guard in a maximum-security male penitentiary could create a risk of violence and jeopardize the safety of inmates); *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) (Court found age to be a BFOQ in an ADEA case because the employment of an older flight engineer could cause a safety emergency and jeopardize the safety of passengers).

form of harassment involves conduct that has the purpose or effect of interfering unreasonably with an individual's work performance or of creating a hostile or offensive working environment. This second form of sexual harassment is referred to as "hostile environment" sexual harassment.

In *Harris v. Forklift Systems, Inc.*, the Court sought to define when a workplace was sufficiently "hostile" for purposes of maintaining a claim under Title VII.[43] The petitioner, a female manager at an equipment rental company, alleged that the company's president created a hostile environment by repeatedly insulting her because of her gender and making her the target of unwanted sexual innuendos.

The Court determined that an employee does not need to suffer injury to assert a hostile environment claim under Title VII: "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive. . . there is no need for it also to be psychologically injurious."[44] While the Court recognized that a standard based on the perceptions of a reasonable person is not "mathematically precise," it emphasized both the need to consider all of the circumstances and the fact that Title VII does not require concrete psychological harm.[45] The Court identified four factors that should be considered to determine whether a hostile environment exists: (1) the frequency of the discriminatory conduct; (2) the severity of such conduct; (3) whether the conduct is physically threatening or humiliating; and (4) whether the conduct interferes unreasonably with an employee's work performance.[46] Although the Court recognized these factors as those to be considered in identifying a hostile environment, it emphasized that no single factor is determinative.

The Court continued its examination of hostile environment sexual harassment in two cases involving vicarious liability. In *Faragher v. City of Boca Raton*, the Court found that an employer is vicariously liable for actionable discrimination caused by a supervisor, subject to an affirmative defense that must consider the reasonableness of the employer's conduct, as well as the conduct of the employee.[47] The petitioner, a former lifeguard for the Marine Safety Section of Boca Raton's Parks and Recreation Department, alleged that she was subject to an environment characterized by lewd remarks, gender-biased speech, and uninvited and offensive touching by her former supervisors.

The petitioner pursued three lines of reasoning drawn from agency law to argue that the City was vicariously liable for the hostile environment created by the supervisors. First, the petitioner contended that the supervisors were acting within the scope of their employment when they engaged in the harassing conduct. Second, the petitioner argued that in creating a hostile environment the supervisors were aided

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[43]510 U.S. 17 (1993).

[44]510 U.S. at 22.

[45]*Id*.

[46]510 U.S. at 23.

[47]524 U.S. 775 (1998).

by their supervisory authority. Third, the petitioner claimed that the City was negligent for failing to prevent the harassment by the supervisors.

In addressing the petitioner's first argument, the Court conceded that a supervisor is responsible for maintaining a productive and safe work environment. However, the Court also contended that it was unlikely that Congress wished courts to ignore the traditional distinction between acts falling within the scope of employment and those amounting to what "older law" recognized as frolics or detours.[48] The Court concluded that when a supervisor expresses his sexual interests "in ways having no apparent object whatever of serving an interest of the employer," such harassment should be classified as beyond the scope of employment and should not impose liability on the employer.[49] Further, the Court stated that if employers were liable for the hostile environments created by supervisors under a "scope of employment" theory, it would be just as appropriate to find liability when such an environment was created by co-workers. The Court expressed reluctance to recognize such liability.

Although the Court rejected the petitioner's scope of employment argument, it was persuaded that the supervisors were aided in creating a hostile environment by their superior positions. The Court recognized that the authority conferred as a result of a supervisor's relationship with the employer allows the supervisor greater ability to act inappropriately: "When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him. . . whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker."[50]

While the Court recognized that there could be vicarious liability for the misuse of supervisory authority, it established the availability of an affirmative defense for employers. This affirmative defense would consist of the employer's assertion that it exercised reasonable care to prevent and correct any sexually harassing behavior. In addition, the affirmative defense would maintain that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The Court believed that the employer's ability to assert such an affirmative defense was consistent with Title VII's objective of encouraging employers to prevent sexual harassment from occurring.[51]

After applying its new rules to the case at bar, the Court concluded that the City did not exercise reasonable care to prevent the supervisors' harassing conduct. Although the City maintained a policy against sexual harassment, it failed to disseminate that policy to beach employees. Further, the City made no attempt to monitor the conduct of the supervisors or assure employees that they could bypass harassing supervisors to register complaints.

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[48]524 U.S. at 798.

[49]524 U.S. at 799.

[50]524 U.S. at 803.

[51]524 U.S. at 805.

The Court addressed briefly the petitioner's third argument of the City's negligence by contending that the regulations of the Equal Employment Opportunity Commission (EEOC) require that employers take steps to prevent Title VII violations. The existence of such regulations established that the City had a duty to prevent the harassment. Although the City did adopt an antiharassment policy in 1986, it failed to implement the policy with respect to beach employees.

The Court revisited the issue of vicarious liability for employers in *Burlington Industries v. Ellerth*, a companion case to *Faragher*.[52] In *Burlington Industries*, the Court maintained that an employer may be found vicariously liable for harassment by a supervisor even if the employee suffers no adverse, tangible job consequences.

The petitioner in *Burlington Industries* alleged that she was subjected to repeated offensive remarks and gestures by a mid-level manager who supervised the petitioner's immediate supervisor. On three occasions, the manager made remarks that could be construed as threats to deny the petitioner job benefits. For example, the manager encouraged the petitioner to "loosen up" because he "could make [her] life very hard or very easy at Burlington."[53] Although Burlington maintained a policy against sexual harassment, the petitioner did not inform anyone in authority about the manager's misconduct. Instead, the petitioner resigned from her position, providing reasons unrelated to the harassment. Three weeks after her resignation, the petitioner informed Burlington of her true reasons for leaving.

While the manager's threats suggested that the claim should be analyzed as a quid pro quo claim, the Court categorized it as a hostile environment claim because it involved only unfulfilled threats. After reviewing the petitioner's claim in terms similar to *Faragher*, the Court determined that the manager at Burlington also misused his supervisory authority. The Court concluded that Burlington should be given the opportunity to assert and prove an affirmative defense to liability.

The availability of punitive damages for violations of Title VII was recently addressed by the Court in *Kolstad v. American Dental Association*.[54] In *Kolstad*, the Court continued to build on its holdings in *Faragher* and *Burlington Industries* by concluding that although an employer may be vicariously liable for the misconduct of its supervisory employees, it will not be subject to punitive damages if it has made good faith efforts to comply with Title VII. The Court noted that subjecting employers that adopt antidiscrimination policies to punitive damages would undermine Title VII's objective of encouraging employers to prevent discrimination in the workplace.

Same-Sex Sexual Harassment

In 1998, the Court interpreted Title VII's prohibition against discrimination "because of. . . sex" to include harassment involving a plaintiff and defendant of the

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[52]524 U.S. 742 (1998).

[53]524 U.S. at 748.

[54]527 U.S. 526 (1999).

same sex.[55] The petitioner in *Oncale v. Sundowner Offshore Services, Inc.* alleged that he was physically assaulted in a sexual manner and was threatened with rape by three male co-workers.[56] Two of the co-workers had supervisory authority over the petitioner.

Although the Court acknowledged that Congress was "assuredly" not concerned with male-on-male sexual harassment when it enacted Title VII, it found no justification in the statutory language or the Court's precedents for excluding same-sex harassment claims from the coverage of Title VII.[57] At the same time, the Court stated that inquiries in same-sex harassment cases require careful consideration of the social context in which particular behavior occurs and is experienced by the claimant. For example, the Court distinguished a football player being patted on the butt in a locker room from similar behavior occurring in an office. The Court contended that this kind of consideration would prevent Title VII from becoming a "general civility code" for the American workplace.[58]

Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs and activities that receive federal funding. Until recently, Title IX claims have been most common among women and girls challenging inequities in sports programs.[59] Title IX is now used as a vehicle for challenging sexual harassment in classrooms and on campuses.

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."[60] The Court's recent decisions involving Title IX address various issues, including the availability of damages and who may be subject to liability.

In *Franklin v. Gwinnett County Public Schools*, a student in the Gwinnett County School District sought monetary damages for violation of Title IX.[61] The petitioner argued that she had been subjected to continual sexual harassment and abuse by a teacher employed by the school district. Although the harassment became known and an investigation was conducted, teachers and administrators did not act and the petitioner was subsequently discouraged from pressing charges. Following

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[55]42 U.S.C. § 2000e-2.

[56]523 U.S. 75, 77 (1998).

[57]523 U.S. at 79.

[58]523 U.S. at 80.

[59]See also Kimberly Jones, *Sexual Harassment in Education: Recent Legal Developments Under Title IX of the Education Amendments of 1972,* CRS Report 98-798A.

[60]20 U.S.C. § 1681(a).

[61]503 U.S. 60 (1992).

Meritor Sav. Bank, FSB v. Vinson, the case in which the Court first recognized hostile environment sexual harassment as a cognizable claim under Title VII, the Court in *Franklin* concluded that when a teacher sexually harasses and abuses a student, the teacher discriminates similarly on the basis of sex.[62]

The Court contended that absent clear direction to the contrary, the federal courts could award any appropriate relief in an action brought pursuant to a federal statute. Thus, because Title IX was silent on the issue of monetary damages, the Court found that they were available for the student.

In *Gebser v. Lago Vista Independent School District*, the Court determined that a school district will not be held liable under Title IX for a teacher's sexual harassment of a student if the school district did not have actual notice of the harassment and did not exhibit deliberate indifference to the misconduct.[63] The petitioner, a female high school student, was involved in a sexual relationship with one of her teachers. Unlike the situation in *Franklin*, the school district did not have actual notice of any sexual relationship between the petitioner and the teacher until they were discovered by a police officer. The principal of the petitioner's school did learn of inappropriate comments made by the teacher prior to the discovery, but he cautioned the teacher about such comments. After the sexual relationship became known, the school district quickly terminated the teacher. Despite the school district's actions, the petitioner argued that the school district should be found liable on the basis of vicarious liability or constructive notice.[64]

In requiring the school district to have actual notice of the harassment, the Court discussed the absence of an express cause of action under Title IX. Unlike Title VII, Title IX does not address damages or the particular situations in which damages are available.[65] While Title IX does address a denial of funds for noncompliance with its provisions, it does not provide for a private right of action. Instead, a private right of action has been judicially implied.[66]

Because Title IX does not contain any reference to the recovery of damages in private actions, the Court reasoned that its recognition of theories of vicarious liability and constructive notice would allow an unlimited recovery where Congress has not spoken.[67] Stated differently, the Court was reluctant to expand the availability of damages for such theories when Title IX failed to provide initially for a private cause of action. In this way, the Court sought to refine its holding in *Franklin* and limit those situations in which a remedy for damages would lie.

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[62]503 U.S. at 75.

[63]524 U.S. 274 (1998).

[64]Under a theory of constructive notice, liability would be established on the grounds that the school district knew or should have known about the harassment, but failed to discover and eliminate it.

[65]524 U.S. at 283-84.

[66]See also *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[67]524 U.S. at 286.

The Court believed that Title IX's remedial scheme would be undermined if it did not require that a school district have actual notice of a teacher's sexual harassment. § 902 of Title IX states that financial assistance will not be denied until the "appropriate person or persons" have been advised of the discrimination and have failed to end the discrimination voluntarily.[68] An "appropriate person" is an official of the entity receiving funds who has the authority to take corrective action.[69] Because the school district in *Gebser* did not have actual notice of the sexual relationship, it could not have taken any steps to end the alleged discrimination.

In addition, the Court stated that damages will not be available unless it is shown that a response exhibits a deliberate indifference to the discrimination; that is, there must be "an official decision by the recipient not to remedy the violation."[70] In *Gebser*, the school district responded to the situation by first cautioning the teacher, and then terminating him once the relationship was discovered. Thus, the Court concluded that the school district did not act with deliberate indifference.

In *National Collegiate Athletic Association v. Smith*, the Court found that a private organization is not subject to Title IX simply because it receives payments from entities that receive federal financial assistance.[71] The respondent, a female graduate student, alleged that the National Collegiate Athletic Association (NCAA) discriminated against her on the basis of sex by denying her permission to play intercollegiate volleyball at two federally assisted institutions. Under NCAA rules, a graduate student is permitted to participate in intercollegiate athletics at only the institution that awarded her undergraduate degree. The respondent graduated from one university, but enrolled at two different universities for her graduate degree. The respondent argued that the NCAA granted more waivers from eligibility restrictions to male graduate students than to female graduate students.

The Court concluded that the NCAA was not a recipient of Title IX funds. The NCAA did not receive federal assistance either directly or through an intermediary. Instead, it received dues payments from member institutions. The Court stated, "[a]t most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage."[72] Because the Court found that the NCAA was not amenable to suit, it did not address the respondent's substantive allegations of discrimination.

Recently, the Court recognized student-on-student sexual harassment as a cognizable claim under Title IX. In *Davis v. Monroe County Board of Education*, a mother alleged that her daughter suffered discrimination as a result of the Monroe County Board of Education's ("Board") failure to respond to the misconduct of

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[68]See 20 U.S.C. § 1682.

[69]524 U.S. at 290.

[70]*Id*.

[71]525 U.S. 459 (1999).

[72]525 U.S. at 468.

another student.[73] While LaShonda, the petitioner's daughter, was in the fifth grade, a male student allegedly made vulgar remarks to her and touched her in an inappropriate manner. Although the petitioner and LaShonda notified the principal and several teachers, the misconduct continued. The male student was never disciplined for his actions. In addition, no effort was made to separate LaShonda and the male student in classes. The petitioner alleged that LaShonda's grades dropped as a result of the harassment. It appears that LaShonda also contemplated suicide because of the male student's continued misconduct.[74]

The Board maintained that the Court should not find a private damages action under Title IX for student-on-student harassment because the statute proscribes only misconduct by grant recipients. Title IX was enacted pursuant to Congress' spending power. In interpreting such spending legislation, courts have generally insisted that recipients of federal funding have adequate notice of misconduct that could jeopardize their funding.[75] Because Title IX proscribes only misconduct by grant recipients, the Board argued that it did not have notice of a possible claim for misconduct by a third party.

However, the Court maintained that a private damages action could exist when a funding recipient intentionally violates the clear intent of Title IX. In *Gebser*, for example, the Court determined that a school district could be liable for the misconduct of a teacher if the school district remained deliberately indifferent to the misconduct. Here, LaShonda's school knew about the harassment and did nothing to address it. In addition, the Court contended that the federal regulatory scheme surrounding Title IX and existing tort law provide examples of schools being liable for the misconduct of third parties. Thus, there was adequate notice that such misconduct could result in liability.

The Court concluded that recipients of federal funding may be liable for subjecting their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student harassment and the harasser is under the school's disciplinary authority. In identifying the level of harassment necessary to state an actionable claim, the Court stated that the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[76] The Court rejected the possibility of students using Title IX to remedy teasing or name-calling by contending that the misconduct must be serious enough to have a systemic effect of denying the victim equal access to an educational program or activity.

While the development of sex discrimination law under Title IX owes much to Title VII, the *Davis* Court's recognition of student-on-student harassment highlights dramatic differences between the two statutes. As suggested by the dissent in *Davis*, any analogies between student-on-student harassment cases and Title VII hostile

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[73]526 U.S. 629 (1999).

[74]*Id*. at 634.

[75]526 U.S. at 640.

[76]526 U.S. at 650.

environment cases are inappropriate because "schools are not workplaces and children are not adults."[77] For that reason, any import of Title VII hostile environment analysis should be done with caution.

Further, the dissent recognized that while there is a cap on money damages under Title VII, no such cap exists for private causes of action under Title IX. Thus, a plaintiff could seek damages close to the amount designated originally to a school district. For example, Monroe County received approximately $679,000 in federal aid in 1992-93.[78] Davis sought $500,000 in damages.[79] The dissent maintained that this "limitless liability" under Title IX would put schools in a far worse position than businesses.[80]

Finally, unlike Title VII, Title IX has no provision for agency investigation. Thus, Title IX does not contain a mechanism for weeding out frivolous claims and settling meritorious ones at minimal costs. While Congress could consider the creation of an agency like the EEOC to handle initial investigations under Title IX, such action could possibly move Title IX closer to Title VII, reducing the distinctions between classroom and workplace.

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[77]526 U.S. at 675.

[78]526 U.S. at 681.

[79]*Id*.

[80]526 U.S. at 681.